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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MARVIN CAGE, Defendant and Appellant.	B170275 (Los Angeles County Super. Ct. No. TA 066131)

APPEAL from a judgment of the Superior Court of Los Angeles County. Arthur M. Lew, Judge. Reversed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Joseph P. Lee and William H. Davis, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant Marvin Cage appeals his conviction after probation was revoked due to an offense he committed at the jail. We reverse on the ground that appellant was not on probation at the time he committed the jail offense.

In August 2002, appellant pleaded guilty to possession of a concealed firearm. His plea bargain involved dismissal of two other firearm counts, with a sentence of three years of formal probation and 90 days in county jail. He was advised that if he violated probation, he could be sentenced to three years in prison.

In September 2002, appellant was sentenced pursuant to the plea.

On March 11, 2003, probation was summarily revoked because appellant had been arrested two days earlier for auto theft. The court ordered that appellant would remain in custody pending further proceedings. A supplemental probation report prepared later that month recommended that probation remain revoked, based on (1) the new arrest, (2) appellant's failure to inform the probation department of a change of address, (3) and incomplete payment of fines and fees.

While appellant was in jail awaiting further proceedings on the revocation case, he was caught on April 8, 2003, with jail-made weapons in his pockets. The jail incident was unknown to the judge and prosecutor at proceedings on April 15, 2003, where appellant admitted that he was in violation of probation. That information was still not known two days later, on April 17, 2003, when the court reinstated probation while imposing a three-year suspended prison sentence and 180 days in county jail.

Probation was again summarily revoked on June 27, 2003, based on the jail offense. At the formal violation hearing on September 16, 2003, a deputy sheriff from the jail described finding the weapons in appellant's pockets. Based on that evidence, the trial court found appellant in violation of probation, revoked probation, and imposed a three-year prison sentence. This appeal followed.

Appellant argues that his probation was erroneously revoked for conduct which occurred prior to the imposition of probation. Respondent counters that revocation was

appropriate because appellant was still subject to the original grant of probation of September 2002 at the time of the jail offense.

Since appellant was not on probation at the time of the jail offense, it could not be the basis for revoking probation, although it could be the basis for a new criminal proceeding.

Penal Code section 1203.2, subdivision (a) permits a probation officer or peace officer to rearrest a probationer and bring him or her to court where there is probable cause to believe that a probation violation has occurred. At that point, "the court may revoke and terminate such probation if the interests of justice so require and the court, in its judgment, has reason to believe . . . that the person has violated any of the conditions of his or her probation, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses . . . ." (Pen. Code, § 1203.2, subd. (a); 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 577, pp. 768-769.)

Revocation of probation occurs at the point where probation is summarily revoked. Due process then entitles the defendant to a formal revocation hearing, before undue time has elapsed, where the prosecution must establish that the alleged violation occurred and revocation is justified. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 340, fn. 1; 3 Witkin & Epstein, Cal. Criminal Law, *supra*, Punishment, §§ 584-586, pp. 777-782.)

The jail offense here was committed between the summary revocation of probation and the reinstatement of probation on April 17, 2003. Thus, at the time the jail offense was committed, appellant's status was that of an incarcerated prisoner, and not that of a probationer.

It may well be true that the court would not have reinstated probation on April 17, 2003, if it had been informed of the jail offense that had occurred on April 8. Pragmatically, this would have left appellant in the same condition as after the formal revocation of probation for the jail offense, i.e., not on probation. However, it remains true that the jail offense did not occur "[a]t any time during the probationary period of a person released on probation." (§ 1203.2, subd. (a).) Under the clear letter of the law,

pragmatic considerations aside, the jail offense could not be used as a basis for revoking probation.

In *People v. Pinon* (1973) 35 Cal.App.3d 120, 123-124, the court held that a guilty plea to a second crime justified revocation of probation on an earlier crime, even though the sentencing hearing on the earlier crime had not yet occurred when the second crime was committed. The case at bench is distinguishable, as appellant had already been placed on probation, and had that probation revoked, at the time of the new crime.

DISPOSITION

The judgment is reversed.

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FLIER, J.

We concur:

COOPER, P.J.

RUBIN, J.